In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-281

YOUNG AND MORGAN, INC., BUGABOO TIMBER COMPANY, and VERNON R. MORGAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT R. CARNEY
GEORGE J. COOPER, III
MORRISON, DUNN, COHEN, MILLER & CARNEY
1700 Standard Plaza
Portland, Oregon 97204
GORDON JOHNSON
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, California 94111
Counsel for Petitioners

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-77

INDEX

CITATIONS

In the Supreme Court
of the United States

OCTOBER TERM, 1977

No._____

YOUNG AND MORGAN, INC., BUGABOO TIMBER COMPANY, and VERNON R. MORGAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on May 3, 1977, as amended by its Order entered July 20, 1977.

OPINIONS BELOW

The opinion of the District Court for the District of Oregon has not been reported. A copy is attached as Appendix B, infra, A8.

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. A copy is attached as Appendix C, infra, A16.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 3, 1977. Petitioners filed a timely petition for rehearing in banc, which was denied on July 20, 1977. A copy of the Order denying the petition and amending the opinion is attached as Appendix D, infra, A24. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Can the "in commerce" concept of jurisdiction under the Sherman Act be expanded to cover alleged restraints operating on standing timber, an unsevered natural resource incapable of interstate movement without prior processing?

2. Can a defendant in a criminal antitrust proceeding be convicted without requiring proof of conscious or intentional participation in joint conduct?

STATUTES INVOLVED

The statute involved is Section 1 of the Sherman Act, 15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand,

or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

Petitioners were indicted with four other corporations and three individuals on September 9, 1974, in the United States District Court for the District of Oregon for criminal conspiracy under Section 1 of the

Sherman Act relating to the bidding for timber sales offered by the United States Forest Service. The indictment charged a single conspiracy alleged to have begun in June of 1967 and to have continued to the date of the indictment. A copy of the indictment is attached as Appendix A, infra, A1.

The indictment charged that petitioners and others, all timber operators, conspired among themselves to eliminate competition in the bidding for timber offered for sale by the United States Forest Service within a single district in the Willamette National Forest, in the State of Oregon.

The jurisdictional provisions of the indictment charged only the "in commerce" theory, and there was no charge that the alleged restraints had any effect upon interstate commerce. Infra, A4-5.

After a court trial an opinion was entered on July 16, 1975. Pursuant to the request of petitioners, the following special findings of fact were made by the District Court:

1. The period of low bidding for timber sales did not begin as a result of any agreement, but was caused by normal economic forces.

2. Within the geographic bidding area resident timber operators would know without any communication between them which timber sales would mostly likely be of particular interest to each other.

3. Although petitioners and others had four meetings during the alleged conspiracy period, and at

times expressed interests in upcoming timber sales, these meetings were not illegal, even when coupled with exchanges of information about such interests.

4. Petitioners and others did not commit themselves not to bid against each other.

5. There was no conspiracy to preclude non-conspirators from bidding on timber sales.

Nonetheless, petitioners were convicted based on the District Court's conclusion that an "implied agreement" had been entered into to eliminate competition, reduce prices paid and allocate timber sales among petitioners and other defendants.

The indictment did not charge and the District Court did not find that the alleged restraints had any effect upon interstate commerce.[1] Nonetheless, subject matter jurisdiction was found to exist on the ground that petitioners "purchased and manufactured the Forest Service timber with the express intent that the end-products they manufactured would continue in the stream of interstate commerce." Infra, A15. This finding would have relevance only when applying the "in commerce" theory.

Fines were levied against all petitioners, and petitioner Morgan received a 60-day sentence. Petition-

---

[1] The Court of Appeals mistakenly characterized the jurisdictional finding of the District Court as being based on the "affect on commerce" theory. That the mistake occurred is apparent from a reading of the unambiguous jurisdictional finding by the District Court based on the "in commerce" theory which was consistent with the jurisdictional allegations in the indictment. Infra, A 15; 4-5.

ers appealed their convictions to the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment of the District Court.

REASONS FOR ALLOWING THE WRIT

1. The decision of the District Court abruptly and erroneously expands for the first time the "in commerce" concept of jurisdiction to cover unsevered natural resources, and raises important and unanswered questions concerning the scope of federal jurisdiction under the Sherman Act, as well as the scope of federal jurisdiction over claims arising under the Clayton and Robinson-Patman Acts which become applicable solely upon the basis of the "in commerce" theory. The proper construction of this jurisdictional basis is an important question of federal law that has not been, but should be, settled by this Court.

The restraints alleged in this case operated upon standing timber, a natural resource, which in its unsevered state is a part of the realty upon which it stands. In most cases the standing timber is not logged for years after the sale, and must undergo many separate processing steps before any final end-product can move across state lines. The indictment did not charge and the lower court did not find any restraint or effect relating to an end-product line.

The factual setting in this case is unusual in that it is a physical impossibility to subject standing timber to interstate movement before any processing or manufacturing steps. As jurisdiction under the Sherman Act has gradually evolved expanding the separate "affect on commerce" theory not in issue here, this Court has never resolved the lingering question of whether "in commerce" jurisdiction can apply to nat-

ural resources separated from the beginning of interstate movement by several stages of processing. In other words, when does interstate movement begin?

This Court has addressed itself to the question of when goods which have themselves been in the flow of interstate commerce come to a rest, or cease to be in the flow. The most universally accepted doctrine is set forth in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 (1943), that doctrine being that when goods cross state lines pursuant to a pre-existing order, or pursuant to imminent anticipated needs of specific customers, the flow continues until such goods reach the ultimate customer or consumer.

The *Jacksonville Paper* doctrine, however, cannot be expanded to cover these restraints. The purchase of standing timber was hardly a "temporary pause" or "convenient intermediate step" as one might encounter in the usual situation where the goods had previously moved in commerce, or where movement was possible without further processing and manufacturing.

Regardless of the intent of the purchaser that end-products derived from a timber sale would one day move in commerce, there was no attempt to show pre-existing contracts, prior orders, or needs of specified customers to fill anticipated demand at the time of the timber sale.

The question of when interstate movement begins for purposes of the "in commerce" theory of jurisdiction was approached by this Court in a different factual setting in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). There, it was found that taxi

trips between train stations in Chicago which occurred in order to allow passengers to change trains in the midst of an interstate journey were in the flow of commerce. However, taxi trips found to have been taken by a passenger to one of the train stations to commence an interstate journey, or a trip taken from one of the stations at the end of an interstate journey, were found not to constitute a part of interstate movement.

The Court in *Yellow Cab* employed the concepts of time and continuity as important factors in considering the placement of the activity "in commerce." Due to the time lag and processing stages required to introduce standing timber into interstate movement, those factors cannot be relied upon here for a finding of "in commerce."

This Court has consistently held that the manufacturing or extraction of natural resources within a single state is purely an intrastate activity, thus not itself in commerce. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Railway Co.*, 249 U.S. 134 (1919); *Crescent Cotton Oil Co.* v. *State of Mississippi*, 257 U.S. 129 (1921); *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344 (1922).

The decision of the District Court placing in the flow of interstate commerce standing timber years prior to intrastate processing and manufacturing is in direct conflict with prior decisions of this Court as well as other circuits. See *Bacon* v. *Texaco, Inc.*, 503 F.2d 946 (5th Cir.), cert. denied, 420 U.S. 1005 (1975) (crude oil shipped into Texas, refined there

into gasoline, held that a sale of gasoline in Texas was not "in commerce" due to substantial changes through processing); *Belliston* v. *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), cert. denied, 408 U.S. 928, reh. denied, 409 U.S. 1001 (1972) (crude oil shipped into Utah, refined there into gasoline, held that a sale of gasoline in Utah was not "in commerce" due to the substantial change of the character of the product). Compare with *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951) (shipment of gasoline in final processed form across state lines from producer to a local distributor in anticipation of supplying constant market demands found to be "in commerce").

This Court has expanded jurisdiction under the Sherman Act to cover a restraint, albeit purely intrastate in character, which nevertheless affects interstate commerce. See, e.g., *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948).[2]

The holding in *Mandeville Island Farms*, supra, cannot serve as the basis for finding jurisdiction in this matter under the "in commerce" theory. *Mande-*

---

[2] Prior to the adoption of the "affect" theory epitomized in *Mandeville Farms*, local activities were oftentimes found to be without Sherman Act jurisdiction based upon *United States* v. *E. C. Knight*, 156 U.S. 1 (1895). It was held in *Knight* that manufacturing or production stages were essentially intrastate activities, and thus restraints occurring at that stage were not in the flow of interstate commerce. While the narrow approach of *Knight* has been criticized in light of the expanding application of the "affect" theory, as to solely the construction of the "in commerce" concept of jurisdiction the decision is still regarded as controlling. See, Von Kalinowski, 1 Antitrust Laws and Trade Regulation, § 5.01 [2] (1975).

ville Island Farms stands for the proposition that the procurement of raw materials does not necessarily preclude Sherman Act jurisdiction if there can be found a substantial affect on interstate commerce caused by the restraint. The subject matter of the restraints in *Mandeville Island Farms*, sugar beets, was not found to be "in commerce," but rather to substantially affect a line of interstate commerce due to the economic intricacies of that industry in that particular factual setting.

Nonetheless, the "in commerce" theory under the Sherman Act, as well as the Clayton and Robinson-Patman Acts, continues to receive restrictive interpretation from this Court.[3] To permit the "in commerce" theory to apply in this factual setting would cause great confusion over the proper jurisdictional limits of other antitrust statutes in light of these narrow interpretive holdings.

The proper construction of the "in commerce" concept should be settled by the Court in order to delineate the jurisdictional division between federal enforcement of antitrust statutes and the state enforcement of such statutes to which impetus is presently being given by state legislatures in allowing their courts to handle such cases. Congress in 1976 recognized the importance of local state antitrust enforcement by the passage of 42 U.S.C. § 3739, which appropriated $30 million in grants over the three fiscal

---

[3] *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974); *United States* v. *American Bldg. Maintenance Industries*, 422 U.S. 271 (1975).

years ending September 30, 1979, to assist states in their antitrust enforcement plans. The Antitrust Division of the Department of Justice has been encouraging states to avail themselves of this funding.

There must be realistic outer limits established for federal jurisdiction over antitrust claims. The Court has warned that under the "in commerce" concept situations should be avoided where jurisdictional overbreadth results in chains of connection with no logical endpoint, and where "[t]he universe of arguably included activities would be broad and its limits nebulous in the extreme." *Gulf Oil Corp.* v. *Copp Paving Co., supra*, 419 U.S. at 198.

The scope of the "in commerce" theory must be viewed in a practical and realistic manner, anchored in the economic logic of the subject matter being includable as a truly interstate ingredient. If allowed to stand, the construction of federal antitrust jurisdiction by the District Court would not only circumvent recent holdings of the Court, but would result in markedly increased litigation based on jurisdictional grounds more properly within the domain of active and able state enforcement agencies.

The issue is extremely significant and timely, and due to the many unanswered questions now existing as to the proper scope of "in commerce" jurisdiction under the Sherman Act as well as the Clayton and Robinson-Patman Acts should be settled by the Court.

2. The usage of statistical evidence to infer the existence of a conspiracy where there is no conscious or intentional participation in such conspiracy results in substantial unfairness and is repugnant to due process notions of criminal justice. In light of the transformation of the Sherman Act into a felony statute, the propriety of dispensing with standard burden of proof protections of criminal defendants in antitrust cases should be settled by this Court.

The findings of fact entered by the District Court dispelled any possibility of an intentional or conscious agreement entered into between petitioners and the other indicted defendants. The legal conclusion of an "implied agreement" was based on a statistical overview of timber sale bids. This conclusion was based on an inference of an implied agreement from the statistical evidence itself, rather than any finding that joint activity caused the statistics.

The inference of a conspiracy from statistics is an unwarranted and dangerous precedent. While it has often been held that the proof of specific intent to violate the law is not required in antitrust prosecutions, and that participants in a conspiracy are presumed to know the legal consequences of their joint activity, nevertheless there still must be a conscious decision to engage in the joint conduct. In a criminal case, this must be shown beyond a reasonable doubt.

Here, the government has been afforded the luxury of disregarding this burden, and the existence of statistical evidence has been found sufficient to prove not only overt acts springing from a conspiracy, but also the existence of the conspiracy itself, and this in spite of a specific finding that no commitments were made by petitioners.

The felony provisions of the Sherman Act, and the official policy of the Antitrust Division of the Department of Justice in recommending extended jail sentences for offenders, make a burden of proof issue of significant importance to the due process rights of criminal antitrust defendants. It is now being recognized that the government should be bound by the same burden of proof requirements in an antitrust case as in other federal criminal proceedings. See *United States* v. *Nu-Phonics, Inc.*, (1977-1 Trade Cases ¶ 61,523 (E.D. Mich., June 20, 1977)). Defendants so charged should be afforded the same protections.

The implication that a misdemeanor prosecution under the Sherman Act does not entitle such defendants to traditional burden of proof guarantees is totally at odds with pronouncements of this Court that misdemeanors and felonies should be treated equally for purposes of constitutional protections. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972). Petitioner Morgan has been sentenced to imprisonment. Further, all petitioners have been notified by the United States Forest Service that as a result of their criminal conviction the possibility exists of debarment from bidding on Forest Service timber sales for an extended period of time. Should this occur the repercussions would be disastrous.

The era of criminal antitrust defendants being merely slapped on the wrist and receiving insignificant fines, often supposedly regarded as nothing more than a cost of doing business, is over. Just as criminal

penalties and the enforcement thereof may change with the evolving social climate, the criminal justice system must be as sensitive and recognize that full and adequate constitutional guarantees must be provided. To ignore these realities would be to perpetuate the long-existing double standard in burden of proof between antitrust and other criminal offenses.

The clash between renewed vitality in the scope of criminal antitrust enforcement and the increasing usage of mere statistical conclusionary evidence to establish the formation of a conspiracy in Sherman Act cases has resulted in a fundamental, yet extremely significant, question of criminal justice which should be settled by the Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT R. CARNEY
GEORGE J. COOPER, III
MORRISON, DUNN, COHEN, MILLER & CARNEY
1700 Standard Plaza
Portland, Oregon 97204
GORDON JOHNSON
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, California 94111
Counsel for Petitioners

August 15, 1977

APPENDIX A

Indictment

Filed September 6, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, v. CHAMPION INTERNATIONAL CORPORATION, YOUNG AND MORGAN, INC., BUGABOO TIMBER COMPANY, FRERES LUMBER COMPANY, INC., FRERES VENEER COMPANY, FRANK LUMBER COMPANY, INC., L. JAMES BAGLEY, VERNON R. MORGAN, ROBERT T. FRERES, and A. J. FRANK, Defendants.	Filed: September 6, 1974 Criminal No. 74-183 (TITLE 15 U.S.C. § 1: Conspiracy in Restraint of Interstate Trade and Commerce.)

INDICTMENT

The Grand Jury charges:

I

THE DEFENDANTS

1. The corporations named below are hereby indicted and made defendants herein. Each of the said corporations is organized and exists under the laws of the state, and has its principal place of business in the city indicated below. Within the period of time covered by this indictment, each of these defendants en-

gaged in the timber products business in the State of Oregon.

Name of Corporation	*State of Incorporation*	*Principal Place of Business*
Champion International Corporation	New York	New York, New York
Young and Morgan, Inc.	Oregon	Mill City, Oregon
Bugaboo Timber Company	Oregon	Mill City, Oregon
Freres Lumber Company, Inc.	Oregon	Lyons, Oregon
Freres Veneer Company	Oregon	Lyons, Oregon
Frank Lumber Company, Inc.	Oregon	Mill City, Oregon

2. Freres Veneer Company is a joint venture between Freres Lumber Company, Inc., and Willamette Industries, Inc. It is managed and operated by Freres Lumber Company, Inc. Young and Morgan, Inc., and Bugaboo Timber Company are affiliated corporations, which are managed jointly with five other corporations and one partnership, all doing business at the same address.

3. The individuals named below are hereby indicted and made defendants herein. During all or part of the period of time covered by this indictment, each has been associated with a defendant corporation in the capacity set forth below:

Name of Individual	*Corporation*	*Position*
L. James Bagley	Champion International Corporation	Oregon Division Logging and Timber Manager; West Coast Logging Manager; Northern Area Logging Manager
Vernon R. Morgan	Young and Morgan, Inc.	Secretary-Treasurer
	Bugaboo Timber Company	Secretary-Treasurer
Robert T. Freres	Freres Lumber Company, Inc.	President
	Freres Veneer Company	General Manager
A. J. Frank	Frank Lumber Company, Inc.	Chairman of the Board; President

II

CO-CONSPIRATORS

4. Various other individuals and companies, including timber products companies operating in the State of Oregon, not made defendants herein, participated as co-conspirators in the offense hereinafter charged, and performed acts and made statements in furtherance thereof.

III

TRADE AND COMMERCE

5. The United States Forest Service, an agency of the United States Department of Agriculture, each year offers for sale public timber located on selected tracts of National Forest lands. Each such timber sale is conducted on an auction basis open to the public. A minimum acceptable bid is set by the Forest Service before the sale. The tract is then sold to the person submitting the highest bid at or above this minimum acceptable bid.

6. The Willamette National Forest is divided into ranger districts, one of which, the Detroit Ranger District, is located in the North Santiam area of north-central Oregon. In 1972, the Detroit Ranger District advertised for sale and auctioned 114,320,000 board feet of timber.

7. The defendant corporations are the largest timber products companies operating in the North Santiam area. In 1972, total sales of their North Santiam operations were approximately $40,000,000. They purchase virtually all of the timber offered for sale by the United States Forest Service in the Detroit Ranger District. After said timber is logged, it is either sold as logs for export or for processing by other mills, or is processed by defendant corporations into timber products such as veneer, plywood, dimensional and rough lumber, wood chips, or other wood-based products.

8. Substantial quantities of said timber are pur-

chased, logged, processed, sold, and shipped by defendant and co-conspirator corporations in a continuous and uninterrupted flow of interstate commerce to purchasers located outside the State of Oregon. Other substantial quantities of said timber are purchased, logged, processed, sold, and shipped by defendant and co-conspirator corporations in a continuous and uninterrupted flow of interstate commerce to wholesalers and brokers located in the State of Oregon, who in turn sell and ship said timber products to customers located outside the State of Oregon.

IV

OFFENSE CHARGED

9. Beginning in or about June of 1967, the exact date being to the grand jurors unknown, and continuing thereafter up to the date of the return of this indictment, the defendants and co-conspirators have engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U. S.C. § 1), commonly known as the Sherman Act.

10. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been:

(a) to eliminate competitive bidding for United

States Forest Service timber;

(b) to allocate United States Forest Service timber among themselves;

(c) to fix, reduce, and stabilize the price paid for United States Forest Service timber at or near the minimum acceptable bid set by the United States Forest Service; and

(d) to bid up any non-conspirator who attempted to bid on United States Forest Service timber.

11. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

V

EFFECTS

12. The aforesaid combination and conspiracy has had the following effects, among others:

(a) competition for United States Forest Service timber has been restrained and eliminated;

(b) prices paid for United States Forest Service timber have been reduced and suppressed at artificial and non-competitive levels;

(c) non-members of the conspiracy have been prevented from purchasing United States Forest Service timber; and

(d) The United States Forest Service has been prevented from selling public timber at competitive prices.

VI

JURISDICTION AND VENUE

13. The aforesaid combination and conspiracy was carried out within the District of Oregon within five years next preceding the return of this indictment.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Opinion of the District Court
Filed July 16, 1975

UNITED STATES OF AMERICA,	)	
v.	)	
CHAMPION INTERNATIONAL CORPORATION, YOUNG AND MORGAN, INC., BUGABOO TIMBER COMPANY, FRERES LUMBER COMPANY, INC., FRERES VENEER COMPANY, FRANK LUMBER COMPANY, INC., L. JAMES BAGLEY, VERNON R. MORGAN, ROBERT T. FRERES, and A. J. FRANK,	)	CR No. 74-183 OPINION
Defendants.	)	

BELLONI, Judge:

This case was tried to the court beginning on June 9 and ending on June 24, 1975.

The indictment charges the defendants with violating Section I of the Sherman Act (15 U.S.C. § 1) by engaging in a combination or conspiracy: to eliminate competition for United States Forest Service timber in the Detroit Ranger District of the Willamette National Forest; to fix, reduce and stabilize the price paid for such timber; to allocate such timber among themselves; and, to bid up any non-conspirators who attempted to obtain such timber.

At the conclusion of the government's case I grant-

ed Motions for Judgment of Acquittal in favor of defendants Frank Lumber Company, A. J. Frank and L. James Bagley. The remaining defendants are Champion International Corporation; Young and Morgan Inc., its affiliate, Bugaboo Timber Co. and Vernon R. Morgan, the general manager of both; and, Freres Lumber Co., Freres Veneer Co. and their agent, Robert Freres. Each of the corporate defendants purchased U. S. Forest Service timber sales during the relevant period.

The Detroit Ranger District[1] is located in the northeastern corner of the Willamette National Forest. Its eastern border runs along the summit of the Cascade Mountain range. There are three timber communities located in the district. They are, from west to east: Lyons, Mill City and Idahna. This district is predominantly a Douglas Fir region. Young and Morgan has mills located at Mill City and Idahna. Freres has mills at Lyons and Idahna. Champion has a mill at Idahna.

The government's theory is that these defendants, in a series of meetings and in personal discussions, set up a system to eliminate competitive bidding among themselves so they could buy U. S. Forest Service timber at bargain prices. Also and as a part of the conspiracy, the government contends that the defendants agreed to bid up any other competition to eliminate competition.

---

[1] In 1968, the Detroit and Mill City Ranger Districts were merged into what is now known as the Detroit Ranger District.

The defendant's theory is that the bidding pattern from mid-1967 to late 1972 was a natural and expected result of observable supply-demand forces; including Simpson Lumber Company's withdrawal from the area,[2] the timber quality and specie mix used by the various defendants and the geography of the North Santiam canyon itself. It is a small canyon and the defendants contend that the local mill capacity and log supply were in balance.

I find that the facts sustain some of the contentions put forth by each side.

I find, from the evidence in this case and beyond a reasonable doubt, the following facts.

Between January 1964 and May 1967, extremely intensive bidding occurred in the Detroit Ranger District. The defendants called this a bidding war. Bids reached as high as three times the amount of the Forest Service appraised price for the timber.[3] There were three principal bidders involved: Simpson, Freres and Young and Morgan.

On June 2, 1967, the bidding was suddenly stopped. On that date, Vernon Morgan appeared as

---

[2] Simpson Lumber Company is the predecessor of Champion in the North Santiam. In October 1968, Champion purchased mills at Lyons and Idahna and a quantity of fee timber from Simpson. The mill at Lyons was closed and never reopened.

---

[3] Very simply, the Forest Service appraised price is reached by the following calculations: The market value of the average end-products that will be produced from the timber *less* average logging and milling costs and a profit and risk margin.

usual to bid for a small sale and no one appeared to bid against him. This was a surprise to Morgan in view of the previous level of biding competition. The government's theory is that this was the beginning of the conspiracy and it presented opinion evidence that this could not have occurred without an agreement among the bidders. I disagree. No evidence of any agreement was presented and, from the evidence, I do not believe one had occurred.

Vernon Morgan then decided to experiment and see what would happen. Later in the same day, there was another sale in which Freres was interested. Morgan qualified[4] but did not bid and Freres bought it without opposition. A few days later, there was another sale which Morgan bought without opposition. Several days later, a sale occurred in which all bidders knew that Simpson was interested. Morgan and Freres laid off bidding and Simpson took the sale without opposition.

The bidders, of course, were delighted with this new bidding pattern because, being without opposition, they were able to purchase the timber sales at or near appraised value. The Forest Service will not accept a bid lower than its own appraised value but it will sell to the highest qualifying bidder who bids at or above appraisal.

---

[4] A "qualified" bidder at a Forest Service oral auction is one who submits a sealed bid of at least the appraised price set by the Forest Service. The oral auction then begins with the bidder submitting the highest sealed bid being the high bidder. Only those "qualified" bidders may participate in the oral auction.

The bidding pattern, immediately following Morgan and Freres' first non-competitive bidding, was caused by normal economic forces and was not the result of any conspiracy. Bidding wars are often followed by a similar pattern. In this small area, the North Santiam canyon, all the operators usually knew which timber sales would most likely be of particular interest to each operator. Perhaps it was located next to one of the operator's plants or his other logging shows or it might be of the specie mix or quality mix that fits one mill better than another. In such a case, it frequently became apparent that one bidder had a built-in advantage over the others. Competitors knew that the bidder with the economic advantage could afford to pay more than the others and not cut into his profits. They also knew if one of them took a sale from the operator who would logically be the most interested in that sale he might retaliate with high bids on a later sale where that competitor had the economic advantage.

In March 1968, Freres called a meeting which was attended by Freres, Morgan and others. At this meeting, one of the topics was the upcoming Forest Service timber sales. Each participant told the others in which upcoming sale or sales his company was interested. Sometimes one of them would go into the reasons for this interest.

This "exchange of interest"[5] continued in each of

---

[5] "Exchange of interest" was a phrase used throughuot this trial. In simple terms, it means that the operators would inform each other of the sales in which they were interested in buying.

the subsequent meetings. The defendants attended a second meeting in April or May of 1969 at Freres Lumber Co. A third meeting was called by Freres in the spring of 1970 at which all defendants were represented. The final meeting of the defendants was held in Albany, Oregon in the early fall of 1971.

Meetings between competitors are not illegal even when coupled with the exchange of information about each participant's interest in upcoming sales. A line must be drawn, however, between the mere exchange of interest and an implied agreement to act on this information. The defendants crossed that line. The following sales were discussed at these meetings.

1968 meeting at Freres:

Champion expressed interest in the four Eagle Rock sales. Champion later took all four sales: three of them at 1, 5 and 6 cent premiums.[6]

1969 meeting at Freres:

Champion expressed interest in the Tom Creek sales. Champion later took both sales at 5 and 90 cent premiums.

1971 meeting at Albany:

Champion, Young and Morgan and Freres each expressed interest in the Cub Point and Leone Hill sales. Champion took Leone Hill at a 10 cent premium. Young and Morgan took Cub Point at a 5 cent premium.

Skunk Creek and Box Canyon # 2 were also discussed. Young and Morgan took Skunk

---

[6] A $.01 premium bid is a bid which is 1 cent per thousand board feet over the appraised price set by the Forest Service.

Creek at a 5 cent premium. Champion took Box Canyon # 2 at a 5 cent premium.

The meetings described above are only examples of the pattern of the defendants' conduct which continues throughout this period. This pattern shows that when only one party expressed interest in a particular sale, the others refrained from bidding against him when that sale occurred. In several instances, more than one party expressed interest in a sale but, when that sale occurred, all but one of the participants, although qualified to bid, did not do so. All of the sales listed above were sold at or near the appraised price without opposition. I find that the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves. At the conclusion of each of the meetings described above, for example, it was understood that the most interested buyer would purchase the sale. No one really committed himself not to bid but in sale after sale over a four year period, the one who had expressed the highest interest in a sale was the one who took the sale without opposition. Where, as here, an operator's existence depends upon his raw material supply, one would not likely pass up a sale unless he knew that a subsequent sale would go to him.

The government has failed to prove that the bidding up of non-conspirators was a part of this combination or conspiracy. However, this allegation is not an essential element to the crime charged.

The requisite element of interstate commerce exists and this court has subject matter jurisdiction over this case. The defendants purchased and manufactured the Forest Service timber with the express intent that the end-products they manufactured would continue in the stream of interstate commerce. *Mandeville Island Farm* v. *American Crystal Sugar*, 334 U.S. 219, 68 S. Ct. 996 (1948).

Therefore, I find the defendants, Champion International Corporation, Young and Morgan, Inc., Bugaboo Timber Company, Freres Lumber Company, Freres Veneer Company, Vernon R. Morgan and Robert T. Freres GUILTY.

This opinion shall constitute findings of fact pursuant to 23(c) Fed. R. Crim. P.

Dated this 16th day of July, 1975.

APPENDIX C

Opinion of the Court of Appeals

Filed May 3, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
CHAMPION INTERNATIONAL CORPORATION, Appellant.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 75-2866
YOUNG & MORGAN, INC.,	)	No. 75-2867
BUGABOO TIMBER COMPANY, et al.,	)	No. 75-2873
Appellant,	)	OPINION
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
FRERES LUMBER COMPANY, INC., FRERES VENEER COMPANY and ROBERT T. FRERES, Appellants.	)	

Appeal from the United States District Court
for the District of Oregon

Before: GOODWIN and SNEED, Circuit Judges,
and POOLE,* District Judge.

---

* The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

GOODWIN, Circuit Judge:

Seven corporate and individual defendants appeal their respective convictions of criminal violations of 15 U.S.C. § 1, under indictments charging a conspiracy to eliminate competition in the bidding for timber offered for sale by the United States Forest Service.

The defendants were engaged in the lumber and plywood business in or near the Detroit Ranger District. The Detroit Ranger District is an administrative division of the Forest Service in Oregon lying between the central Willamette Valley and the summit of the Cascades.

After determining the allowable harvest and other factors relevant to the federal timber management program, the district ranger offers for sale at public auction the various tracts of timber scheduled for cutting. Lumber and plywood manufacturers receive announcements sufficiently in advance of each sale so that, as potential buyers, they may decide whether and how much to bid. They evaluate the quality, quantity, and location of the timber, the difficulty of logging, hauling distances, road-building requirements, climate and weather conditions, and other factors that may or may not make a particular sale attractive.

All the relevant sale information was made public. But the defendant operators were located in or near the Detroit district and were in a position to supplement public announcements with their own knowledge of the timber and terrain. More important to bidding, they knew the production capacities and

product mixes of their own and neighboring plants. It was the government's theory that the defendants illegally exchanged information, based upon their special knowledge, to restrict bidding. During the period covered by the indictment, the defendants purchased about 90 percent of the sales made by the district.

The defendants were convicted of engaging in a combination and conspiracy in restraint of trade. The specific charges were that they entered into a continuing agreement, understanding and concert of action: "(1) to eliminate competitive bidding for United States Forest Service timber; (2) to allocate United States Forest Service timber among themselves; (3) to fix, reduce, and stabilize the price paid for United States Forest Service timber at or near the minimum acceptable bid set by the United States Forest Service, and (4) to bid up any non-conspirator who attempted to bid on United States Forest Service timber." After a trial without a jury, the court found the appellants guilty of the first three specifications.

The appellants, challenging the court's findings, point to the undisputed economic and geographic factors relevant to any bidding on timber by the local operators, and argue that there was no conspiracy—just the exercise of ordinary common sense by individual bidders who saw no reason to throw their money away, and we were under no legal duty to do so.

The government argues that no mater how self-evident the economies of their bidding conduct may

have been, independent pursuit of self interest could not overcome the inference of collusion which is almost compelled by the methodical manner in which the defendants took turns acquiring without substantial competition most of the various cutting contracts offered by the Forest Service during the period covered by the indictment.

A. SUFFICIENCY OF EVIDENCE

The district judge, in his written findings, took note of the bidding practices that had prevailed in the region prior to the time covered by the indictment, and observed that the earlier period was marked by intensely competitive bidding, sometimes bringing into government coffers prices three times the appraised value of the timber offered in the auctions. (Trial witnesses had characterized this period as one of a "bidding war.")

Prior to 1967, high demand for the various species of timber offered for sale kept local bidding competition at a generally high level. This "bidding war" came to a sudden end on June 2, 1967, when defendant Vernon Morgan "was surprised" to find no one bidding against him at an auction of a small offering of government timber. Morgan decided, he said, "to experiment," and later that same day he offered no bid against defendant Freres on another sale, with the result that Freres took the second sale at a nominal figure over the appraised price.

The trial court agreed with the defendants that a new bidding pattern had thus developed by "normal economic forces," presumably in a noncollusive evolu-

tion, and it "delighted" the bidders. The court went on to note that for the next two or three logging seasons the defendants were able to buy most of the sales they wanted at prices approximating the government's appraised prices. (If a sale did not bring at least the appraised price, the government would cancel the sale.) But desite the innocent beginnings of the non-competitive bidding, the trial court found collusion in its continuation.

There was evidence that managers or agents of the various defendant entities began meeting from time to time to review the government's forecasts of upcoming sales. At these meetings the operators discussed among themselves which of the sales would be most interesting to each respective bidder. The defendants have always asserted that these meetings were innocent, but the court found otherwise.

In a general way, the extent of an individual operator's interest in a future sale could have been predicted by anyone familiar with the operator's hauling distances, his product mix, his manufacturing capacity, and the other factors that determine a sale's relative desirability to that operator. However, the defendants did not leave the exchange of this information to chance. During the time covered by the indictment the defendants advised each other about the future sales upon which they were most likely to bid. Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants "had an understanding" about bidding.

The government was unable to introduce direct evidence of an express agreement, but argues that the circumstantial evidence proved the existence of the tacit agreement found by the judge. We agree.

The trial judge was not convinced beyond a reasonable doubt that the defendants were guilty of "biding up" outsiders with the requisite illegal purpose. But this failure of proof does not undermine the ultimate finding of a violation of the Sherman Act as charged in the other specifications of the indictment.

B. INTERSTATE COMMERCE

Even if activities alleged to be illegal are wholly intrastate, the requisite jurisdiction under the Sherman Act can be found if the activities substantially affected interstate commerce. *Teamsters Local 167* v. *United States*, 291 U.S. 293 (1934). From evidence produced at trial, the judge found that the charged conspiracy had a substantial effect on interstate commerce. The substantiality of the effect of a restraint on interstate commerce must be measured by the substantiality of the interstate commerce which is touched by the restraint, and not by the competitive impact of the restraint. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). There was no error in finding the necessary effect upon commerce.

C. SPECIFIC INTENT

Champion argues that in "specific intent cases" it must be shown that the conspiracy was knowingly formed, and that the defendant willfully participated

in the unlawful plan. However, under the Sherman Act no specific intent need be shown. As the Supreme Court stated in *United States* v. *Masonite Corp.*, 316 U.S. 265 (1942):

> ". . . And as respects statements of various appellees that they did not intend to join a combination or to fix prices, we need only say that they must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. *United States* v. *Patten*, 226 U.S. 525, 543 . . . ." 316 U.S. at 275.

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), rev'd on other grounds, 370 U.S. 19 (1962), this court held that in a Sherman Act case, it is "not necessary to find a specific intent to restrain trade or eliminate a competitor . . . ." 284 F.2d at 26.

D. USE OF GRAND JURY TRANSCRIPT

Defendant Freres contends that the district court erred in permitting the government to read portions of a grand jury transcript during trial. Prior sworn recorded statements of a witness are admissible as substantive evidence, if the witness admits that the statements were true when made. Fed. R. Evid. 801 (d)(1); *United States* v. *Klein*, 488 F.2d 481 (2d Cir. 1973), cert. den. 419 U.S. 1091 (1974); *United States* v. *Ellis*, 461 F.2d 962, 969 (2d Cir.), 409 U.S. 866 (1972); *United States* v. *Schwartz*, 390 F.2d 1 (3d Cir. 1968); *Finnegan* v. *United States*, 204 F.2d 105, 115 (8th Cir.), cert. den. 346 U.S. 821 (1953);

Harman v. *United States*, 199 F.2d 34, 36 (4th Cir. 1952). In each instance of the use of such testimony here, the witness was asked whether he in fact gave the answer and whether he testified truthfully when he gave it. And in each instance the witness affirmed the truth of the grand jury transcript. Thus, there was no error in the use of the grand jury testimony, even though leading questions appear in some of the grand jury testimony.

The judgments are affirmed.

APPENDIX D

Order of the Court of Appeals Denying Rehearing

Filed July 20, 1977

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
CHAMPION INTERNATIONAL CORPORATION, Appellant.	)	
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 75-2866
YOUNG & MORGAN, INC.,	)	No. 75-2867
BUGABOO TIMBER COMPANY, et al., Appellant,	)	No. 75-2873
	)	ORDER
UNITED STATES OF AMERICA, Appellee,	)	
v.	)	
FRERES LUMBER COMPANY, INC., FRERES VENEER COMPANY and ROBERT T. FRERES, Appellants.	)	

Appeal from the United States District Court
for the District of Oregon

Before: GOODWIN and SNEED, Circuit Judges,
and POOLE,* District Judge.

---

* The Honorable Cecil F. Poole, United States District Judge for the Northern District of California, sitting by designation.

The opinion filed May 3, 1977, in the above-entitled case is amended as follows:

Beginning in the fifth line of the text, in the left-hand column of page 879 of the printed slip sheet, delete everything beginning with "Prior sworn recorded statements" through the end of the opinion, and substitute the following language:

> "Prior inconsistent testimony of a witness before a grand jury is admissible as substantive evidence if the same witness testifies at the trial. Fed. R. Evid. 801(d)(1)(A). The portions read were admissible under the cited rule, even though some of the grand jury testimony had been elicited by means of leading questions. There was no error.
>
> The judgments are affirmed."

With the opinion so amended, the panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion as set forth above, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.